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IN THE
COURT OF APPEALS OF INDIANA

ROY M. WINSTEAD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A01-0608-CR-355
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN CIRCUIT COURT
Cause No. 15C01-0601-FC-7
The Honorable James D. Humphrey, Judge

May 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Roy M. Winstead appeals his three-year sentence for theft as a class D felony. We affirm.

Issue

Winstead presents one issue, which we restate as whether the trial court properly sentenced him.

Facts and Procedural History

On January 20, 2006, Winstead was shopping at a Family Dollar store in Lawrenceburg. He approached a check-out lane and saw a cashier counting money from her drawer. When she put down the money to assist Winstead with his purchase, he grabbed it—$473.45 in cash and checks—and ran out of the store. When he reached his locked van in the parking lot, he broke the rear window to get inside. He drove away and was arrested "just up the road" a short time later. Tr. at 24. Police administered a breathalyzer test, which revealed that his blood alcohol level was above the legal limit.

On January 24, 2006, the State charged Winstead with class C felony robbery and class D felony theft. At a hearing on June 5, 2006, Winstead pled guilty to class D felony theft. In exchange, the State dropped the class C felony robbery charge. Sentencing was left to the discretion of the trial court. On July 26, 2006, the trial court sentenced Winstead to

three years, the maximum sentence within the range designated by statute.[1] Winstead now appeals.

Discussion and Decision

Winstead contends that his sentence is "manifestly unreasonable" pursuant to Indiana Appellant Rule 7(B). Appellant's Br. at 3. As another panel of this court recently noted:

> Before January 1, 2003, Indiana Appellate Rule 7(B) provided: "The Court shall not revise a sentence authorized by statute unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender." Today, the same rule provides: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." … [T]he change in language is not simply a matter of semantics. Rather, our Supreme Court has made clear that in changing the language of Indiana Appellate Rule 7(B), it changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied. *Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005).

Patterson v. State, 846 N.E.2d 723, 730 n.7 (Ind. Ct. App. 2006) (some citations and some quotation marks omitted). Winstead also claims that the trial court erred in failing to find certain mitigating circumstances.

Indiana's sentencing scheme was amended effective April 25, 2005. Indiana Code Section 35-38-1-3 provides that if a trial court finds aggravators or mitigators at sentencing, it must make a statement of its "reasons for selecting the sentence it imposes." However, a trial court may impose any sentence authorized by statute or permissible under the Indiana Constitution "regardless of the presence or absence of aggravating circumstances or

[1] According to Indiana Code Section 35-50-2-7, "[a] person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years."

mitigating circumstances." Ind. Code § 35-38-1-7.1(d). Although our supreme court has not yet interpreted the current version of this statute, its plain language seems to indicate that "'a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances[,]'" so long as the sentence is within the applicable statutory range. *Primmer v. State*, 857 N.E.2d 11, 17 (Ind. Ct. App. 2006) (quoting *Fuller v. State*, 852 N.E.2d 22, 26 (Ind. Ct. App.2006), *trans. denied*.).

Furthermore, a trial court is not required to use the statutory advisory sentence as a starting point in its sentencing considerations. *See* Ind. Code § 35-50-2-1.3(a) (for purposes of felony sentencing, "'advisory sentence' means a guideline sentence that the court may *voluntarily* consider as the midpoint between the maximum sentence and the minimum sentence.") (emphasis added).

Even assuming, without guidance from our supreme court, that we still must assess the trial court's finding and balancing of aggravators and mitigators, Winstead's argument fails. At Winstead's sentencing hearing, the trial court assigned significant aggravating weight to his lengthy criminal history. The court found no mitigators. Winstead contends that the trial court erred in failing to consider as mitigators the nature and circumstances of the crime, the lack of intent to harm, the unlikelihood that the circumstances leading to the crime will recur,

the likelihood that Winstead will respond affirmatively to short-term imprisonment, Winstead's remorse, and undue hardship.[2]

The finding of mitigating factors is not mandatory and rests within the discretion of the trial court. *Dylak v. State*, 850 N.E.2d 401, 410 (Ind. Ct. App. 2006), *trans. denied*. The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor, nor is the court required to give the same weight to proffered mitigating factors as the defendant does. *Id*. Moreover, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. *Id*. To prove an abuse of discretion, the defendant must establish that the mitigating evidence is both significant and clearly supported by the record. *Id*.

At sentencing, Winstead did not argue most of the mitigators that he now claims the trial court failed to find, such as the unlikelihood that the circumstances leading to the crime will recur, the likelihood that he will respond affirmatively to short-term imprisonment, his remorse, and undue hardship. Thus, Winstead has waived review of these alleged mitigators. *See Pennington v. State*, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) (defendant's failure to raise proposed mitigators at sentencing precludes him from raising them for first time on appeal). As for the other proffered mitigators—the nature and circumstances of the crime and his lack of intent to harm—the trial court was not obligated to agree with Winstead that

[2] We note that Winstead cites a prior version of Indiana Code Section 35-38-1-7.1(a) in his brief. That version of the statute required a trial court to consider several factors in determining what sentence to impose. The current version of this statute, effective April 25, 2005, lists factors that the trial court *may* consider as aggravators and mitigators in determining sentence.

these were significant mitigators.[3] *See Dylak*, 850 N.E.2d at 410. Winstead also argues that his guilty plea should have been considered a mitigator; however, in this case, Winstead had already benefited from his plea because, in exchange, the State agreed to drop a class C felony robbery charge. Therefore, it was well within the trial court's discretion not to assign significant mitigating weight to Winstead's guilty plea. *See Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("[A] guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one.").

In sum, we find no abuse of discretion in the trial court's identification and balancing of aggravators and mitigators. Clearly, the trial court was authorized by Indiana Code Section 35-50-2-7 to sentence Winstead within the advisory range of one-half year to three years. Further, as we review Winstead's sentence pursuant to Indiana Appellate Rule 7(B), we must consider Winstead's extensive criminal history spanning nearly twenty years, and the fact that this particular crime, like many of his past offenses, occurred while he was intoxicated. It is apparent that Winstead's alcoholism is a longtime problem which he has failed to seriously address and which he uses to excuse his criminal behavior. Thus, we cannot conclude that the trial court's imposition of a three-year sentence is inappropriate in light of the nature of the offense and the character of the offender.

[3] At sentencing, Winstead's counsel stated that "as far as theft goes, it's I guess you would say a run of the mill theft, nothing particularly nasty about it or gruesome or threatening. …[I]t does seem to appear that he drinks, gets behind the wheel, or just drinks and does something foolish, he obviously needs help with drinking, but all in all, the facts of the case could have been a lot more severe then what they are." Tr. at 27-28.

Affirmed.

BAKER, C. J., and FRIEDLANDER, J., concur.